Supreme Court, U.S.
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No. 90-1449

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

RICHARD F. HARRINGTON,

Petitioner,

v.

AETNA-BEARING COMPANY, a wholly-owned subsidiary of Katy Industries, Incorporated, and KATY INDUSTRIES, INCORPORATED,

Respondents.

On Petition For Writ Of Certiorari To The United States Court of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does the expiration of an employment contract by its terms when an employee reaches age 70 violate the Age Discrimination in Employment Act of 1967, 29 U.S.C. §621 *et seq.*?

LIST OF PARENT CORPORATIONS AND SUBSIDIARIES OF RESPONDENTS

Respondent Aetna-Bearing Company (now known as Aetna Liquidating Company)

Parent corporation: Katy Industries, Inc.

Aetna has no subsidiaries

Respondent Katy Industries, Inc.

Katy Industries, Inc. has no parent corporation

Subsidiaries (other than wholly-owned subsidiaries):

Bee Gee Holding Company, Inc.
C.E.G.F. (USA), Inc.
Compagnie des Entrepots et Gares Frigorifiques
Duckback Industries, Inc.
Finson International, Inc.
Schön & Cie, AG
Syratech Corporation

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents Aetna-Bearing Company ("Aetna") and Katy Industries, Inc. ("Katy") respectfully pray that this Court deny the petition for writ of certiorari to review the judgment and opinion entered in this proceeding by the United States Court of Appeals for the Seventh Circuit.

REASONS TO DENY THE WRIT

A. Misstatements Of Fact And Law

In a strained attempt to bring this case under the rubric of Rule 10 of this Court, the petition of Richard F. Harrington ("Harrington") contains a number of misstatements of fact and law. When these misstatements are exposed, it becomes obvious that there is no reason to grant the petition.

First, the thrust of Harrington's claim in the petition is that mandatory retirement constitutes a violation of the Age Discrimination in Employment Act, 29 U.S.C. §621 *et seq.* (1967) (the "ADEA"). Harrington's reliance upon mandatory retirement cases, and his suggestion that this is a mandatory retirement case, constitute a glaring misstatement. Both the Seventh Circuit and the District Court held that this is not a mandatory retirement case:

> Indeed, there is no contention that at any stage in Aetna's dealings with Harrington the company was trying to get him to retire. Hence cases such as (citation omitted), on which Harrington relies, are inapposite; in them, the employer is accused of trying to induce early retirement by penalizing the worker who does not take it. . . . (Aetna) made no move to fire or retire Harrington when the contract expired.

Harrington v. Aetna-Bearing Company and Katy Industries, Inc., 921 F.2d at 717, 719 (7th Cir. 1991).

> The problem, of course, is the contract contains no mandatory retirement clause—it contains only an expiration date. The contract does not even require retirement—a fact not in dispute since

> Harrington remained on the job for half a year after the contract expired and until the business was sold.

Harrington v. Aetna-Bearing Company and Katy Industries, Inc., 729 F. Supp. 1217, 1219 (N.D. Ill. 1990).

Second, contrary to Harrington's references (Petition, pp. 3, 4, 6, 8, 9), this is not a case involving "tenure," "duration of employment" or termination of employment. It simply involves an employment contract with one person which expired by its terms. Harrington's employment did not end when the contract expired; all that ended was Harrington's *employment under the contract.*

A third misstatement is Harrington's suggestion (Petition, pp. 4, 6, 8) that Aetna took some action or made some decision on August 7, 1988, when Harrington's employment contract expired. As the District Court recognized, the ADEA and interpretative case law deal with actions or conduct by an employer:

> But I find it more appropriate to measure Harrington's status in terms of whether Aetna's affirmative act or its failure to fulfill a duty caused Harrington's relation to the company to change from one day to the next. This is so because the law invoked here is violated by acts or omissions of an employer's obligation, the law is not intended to guarantee against all changes in status occurring with the passage of time.

729 F. Supp. at 1218.

Harrington's petition evidences his continued improper characterization of the expiration of his employment contract as conduct by his employer in order to attempt to invoke the protection of the ADEA. Harrington artfully uses language which purports to convey the image of af-

firmative acts by Aetna on August 7, 1988: Aetna "considered his employment contract at an end" (Petition, p. 4), Aetna "cause(d) . . . promises to expire" (Petition, p. 6) and Aetna "retained the 'age 70' term . . ." (Petition p. 8) Indeed, Harrington couches the question presented for review in his petition in terms of his employer's "enforce(ment)" of an employment contract. (Petition, p. 1)

But the Seventh Circuit properly rejected this approach and recognized that Aetna took no action and made no decision on August 7, 1988. The contract simply expired by its terms:

> [T]he contract expired not because Aetna made a judgment that Harrington was too old, but because the contract had a definite term and the term had ended . . . There was no decision by Aetna (when the contract expired) to retire him, fire him, to reduce his compensation or otherwise to discriminate against him on account of his age . . .

921 F.2d at 720.

Finally, it is clear that the sole basis of Harrington's claim was the expiration of his contract on August 7, 1988. Harrington's suggestion now that his claim was also based on Aetna's earlier refusal to extend or amend the contract (Petition, p. 8) is a misstatement of the record. As the Seventh Circuit acknowledged, Harrington "does not contend that the refusal to renew the employment contract upon its expiration was an act of discrimination." 921 F.2d at 719. Nor could that "refusal" be challenged; it is barred by the statute of limitations. 921 F.2d at 719-720.

B. The Petition Does Not Satisfy The Requirements Of Supreme Court Rule 10

A careful reading of the Seventh Circuit opinion in conjunction with the ADEA and the Supreme Court and Appellate Court cases cited by Harrington demonstrates that none of the Supreme Court Rule 10 considerations are met. While the Rule's list of factors is not exhaustive, it is clear that Harrington misperceives what the Seventh Circuit did and he has no basis for a certiorari review.

The Seventh Circuit's decision is not in conflict with applicable decisions of this Court nor with any decision of another United States Court of Appeals on the same matter. Moreover, the Seventh Circuit did not decide "an important question of federal law." Sup. Ct. R. 10.

The Seventh Circuit simply decided that the expiration of Harrington's employment contract by its terms when he reached age 70 was not an act of age discrimination. 921 F.2d at 721. The Seventh Circuit found that age did not trigger a reduction in Harrington's employment rights. Instead, the employment contract conferred extraordinary benefits upon him for a limited time. 921 F.2d at 719. The Seventh Circuit properly recognized that it "is not discrimination to offer an employee a contract that does not last forever." 921 F.2d at 721. The purpose of the ADEA is "not to provide older employees with job security." 921 F.2d at 721.

The Seventh Circuit also recognized that the expiration provision fixed by Harrington's 70th birthday was no different than a provision fixed by a term of years. "A term must begin on a particular day and end on a particular day." 921 F.2d at 720. Moreover, the court understood the "extraordinary result" that would occur as the result of Harrington's position. Under Harrington's theory, any

employment contract with a termination date based on an employee's age of 40 or more would violate the ADEA and, therefore, such a contract would have to continue indefinitely. This would "as a practical matter abolish employment contracts for employees over the age of 40." 921 F.2d at 720.

The Seventh Circuit's opinion does not create a "loophole" in the ADEA, nor does it conflict with the ADEA or with cases construing it. Petitioner has cited no cases which hold that the expiration of an employment contract after an employee reaches age 40 is unlawful. "There is nothing in the age discrimination law or in the cases which make illegal *per se* contracts which expire after a contract employee reaches forty." 729 F. Supp. at 1218.

Moreover, the ADEA deals with challenged actions or decisions of employers, not with the expiration of contracts. Since no action or decision took place here, the Seventh Circuit's opinion does not conflict with the cases cited by Harrington in which an action or decision did occur. For this reason, *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985) (employer adopted a transfer policy); *Hishon v. King & Spaulding*, 467 U.S. 69 (1984) (employer decided not to grant plaintiff partnership status based on sex); and *EEOC v. School Board of Pinellas Co.*, 742 F.Supp. 622 (M.D. Fla. 1990) (employer switched employee from continuing to annual contract) are inapplicable.

Nor does the Seventh Circuit's opinion conflict with the mandatory retirement cases cited by petitioner. *Trans World Airlines, supra; Gregory v. Ashcroft*, 898 F.2d 598 (8th Cir.), *cert. granted*, 111 S. Ct. 507 (1990); *EEOC v. State of Vermont*, 904 F.2d 794 (2d Cir. 1990); *EEOC v. Tennessee Wildlife Resources Agency*, 859 F.2d 24 (6th Cir. 1988); *Schlitz v. Commonwealth of Virginia*, 854 F.2d

43 (4th Cir. 1988); *EEOC v. Wyoming Retirement System*, 771 F.2d 1425 (10th Cir. 1985). Because this is not a mandatory retirement case, those cases do not apply.

Finally, the Seventh Circuit did not decide an important question of federal law. This case simply involves the question of whether the expiration by its terms, of a particular contract between a particular employee and a particular employer, when the employee reached age 70, violated the ADEA. The case is fact specific to a particular contract and certainly does not have widespread application.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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